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No. 03-569

IN THE

Supreme Court of the United States

ALLIANT ENERGY CORPORATION,
Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE and
ROBERT M. GARVIN, in their official capacities as
Commissioners of the Wisconsin Public Service Commission,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
DAVID A. PRICE
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

DONALD B. VERRILLI, JR.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

November 17, 2003

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

1. Are Wisconsin statutes that prohibit transactions that occur outside of Wisconsin between non-Wisconsin entities and a non-Wisconsin investor that owns as little as a 5% interest in a Wisconsin utility subject to a per se Commerce Clause scrutiny and not subject to the *Pike* balancing analysis?

2. If Wisconsin's regulation of the transactions of non-Wisconsin entities occurring wholly outside of Wisconsin is subject only to the *Pike* balancing analysis, must the balance include consideration of other Wisconsin statutes that fully protect ratepayers but without any extraterritorial impact on interstate commerce?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
INTEREST OF AMICUS CURIAE 1
INTRODUCTION AND SUMMARY OF ARGUMENT 3
REASONS FOR GRANTING THE WRIT 7
CONCLUSION 19

TABLE OF AUTHORITIES

CASES

A.S. Goldmen & Co. v. New Jersey Bureau of Securities, 163 F.3d 780 (3d Cir. 1999).....7, 12

American Insurance Ass'n v. Garamendi, 123 S. Ct. 2374 (2003).....17

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).....15, 16

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986).....*passim*

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).....11

Edgar v. MITE Corp., 457 U.S. 624 (1982).....6, 10, 12

Healy v. Beer Institute, Inc., 491 U.S. 324 (1989)....*passim*

National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).....2

Pharmaceutical Research & Manufacturers of America v. Concannon, 249 F.3d 66 (1st Cir. 2001), *aff'd sub nom. Pharmaceutical Research & Manufacturers of America v. Walsh*, 123 S. Ct. 1855 (2003).....7, 13

Pharmaceutical Research & Manufacturers of America v. Walsh, 123 S. Ct. 1855 (2003).....13

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).....3, 8

Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945).....16

STATUTES

1935 Public Utility Holding Company Act, 15 U.S.C. § 79a *et seq*. 17

Wis. Stat. § 196.795(1)(h)1.a. 3, 6

Wis. Stat. § 196.795(3) 4, 7

Wis. Stat. § 196.795(5)(L) 3

Wis. Stat. § 196.795(6m)(b) 4, 7

Wis. Stat. § 196.795(7)(a) 4

Wis. Stat. § 201.01(2) 4

Wis. Stat. § 201.03 ..... 4, 7

Wis. Stat. § 201.05 ..... 4, 7

Wis. Stat. § 201.11 ..... 4, 7

LEGISLATIVE MATERIAL

Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 17

An Act to Enhance Energy Conservation & Research & Development, H.R. 6, 108th Cong. (1st Sess. Sept. 2, 2003) 17

MISCELLANEOUS

Michael Barbaro, *Consumers Must Demand A (Pricey) New Power Grid*, Wash. Post, Aug. 24, 2003 15

Peter Behr, *Legislation Would Set Rules for Grid*, Wash. Post, Nov. 15, 2003 18

Hoover's Company Profiles, October 9, 2003, available at 2003 WL 61723089 17

Mike Naeve, *How to Prevent Future Blackouts*, Wash. Post, Aug. 17, 2003 15

Order Authorizing Acquisition of Registered Holding Company by Foreign Holding Company, International Series Release No. 1217; 70-9473 and 70-9519 (March 15, 2000), available at 2000 WL 279236 17

Edward Walsh, *Blackout Sheds Light on Issue*, Wash. Post, Aug. 17, 2003 15

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50

states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before numerous federal and state courts in cases raising issues arising under the dormant Commerce Clause. *See, e.g., National Foreign Trade Council v. Natsios,* 181 F.3d 38 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).

Amicus is concerned that the analysis adopted by the Seventh Circuit in this case directly threatens core principles the Commerce Clause exists to protect. The appeals court upheld provisions of a Wisconsin statute that directly regulate investment transactions between non-Wisconsin entities occurring entirely outside of Wisconsin, despite the acknowledged fact that the Wisconsin law significantly impedes the free flow of investment in the utility industry – investment from domestic and international sources of capital that is badly needed in that industry. If Wisconsin's statute and statutes like it are permitted to stand, this will be to the grave detriment of the national interest in having a utility industry capable of growing, modernizing, and keeping pace with consumer demand.

Amicus is filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

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[1] Pursuant to Supreme Court Rule 37.6 *amicus curiae* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commerce Clause proscribes state laws "that directly control[]" extraterritorial commerce – that is, "commerce occurring wholly outside the boundaries of a State" – with the "critical inquiry" being "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State," "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989); *see Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986) (striking down a state statute that in operation "directly regulate[d]" out-of-state transactions by "[f]orcing a merchant to seek regulatory approval in [the regulating] State before undertaking a transaction in another [State]"). Such statutes, this Court has explained, are "virtually per se invalid." *Brown-Forman*, 476 U.S. at 579. They are not analyzed under the more lenient balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), applicable to state regulation that has "only indirect effects on interstate commerce" and is also "evenhanded[]" as between its treatment in-state and interstate commerce. *Brown-Forman*, 476 U.S. at 579; *see also Healy*, 491 U.S. at 337 n.14.

The issue presented in this case is whether the core provisions of the Wisconsin Utility Holding Company Act ("WUHCA"), Wis. Stat. § 196.795, *et seq.* are per se invalid under this Court's precedents. The WUHCA defines utility holding companies as companies owning, controlling, or holding 5% or more of the outstanding voting securities of a Wisconsin public utility. Wis. Stat. § 196.795(1)(h)1.a. As enacted, the WUHCA required all such holding companies to be incorporated as Wisconsin corporations. Wis. Stat. § 196.795(5)(L). The WUHCA subjects these holding

companies to the following structural restrictions: (1) no person may "take, hold or acquire, directly or indirectly," more than 10% of a holding company's shares without approval by the Wisconsin Public Service Commission ("PSC"), the State's utility regulatory authority, Wis. Stat. § 196.795(3); (2) a holding company's non-utility investments may not amount to more than 25% of the company's utility assets, Wis. Stat. § 196.795(6m)(b); (3) if a holding company's non-utility affiliates do not or cannot reasonably be expected to conduct business in certain areas related to energy conservation, utility services, or business generation in Wisconsin, the holding company is deemed a "public service corporation," Wis. Stat. §§ 196.795(7)(a) and 201.01(2), and, as such, cannot raise capital by selling its securities without prior PSC approval of the sale itself as well as the amount and purpose of the sale, Wis. Stat. §§ 201.03, 201.05; and (4) the PSC may prohibit a public service corporation from paying dividends if the PSC finds the corporation's capital to be impaired, Wis. Stat. § 201.11.

Petitioner Alliant Energy Corporation ("Alliant") challenged these provisions of the WUCHA, alleging that they were per se invalid under this Court's Commerce Clause teachings in *Healy* and *Brown-Forman* because they directly regulated out-of-state investment transactions. The district court rejected that challenge. Appendix to Petition for Certiorari ("Pet. App.") at 38a. On appeal, the Seventh Circuit agreed with Alliant that the WUCHA requirement of in-state incorporation of any holding company owning more than 5% of a Wisconsin public utility was invalid. The panel recognized that "[a]n investment opportunity in a Wisconsin utility is . . . an article of interstate commerce," and that "[i]f ownership of a Wisconsin utility company must lie with a Wisconsin Corporation, a potential article of

interstate commerce, i.e., the investment in the utility, is stopped at the border." *Id.* at 22a. The panel also noted that the potential burdens on interstate commerce were substantial because if every State adopted the identical rule "there would be no interstate investment in public utilities at all." *Id.* at 23a. The court concluded that the requirement of in-state holding company incorporation would likely be invalid as a per se matter under *Brown-Forman*, but believed it unnecessary to make that determination: this provision failed even the *Pike* balancing analysis because the State was unable to identify any "legitimate local benefits to balance against the burden on interstate commerce." *Id.* at 24a.

Having invalidated the in-state holding company incorporation requirement, the appeals court then unaccountably went on to conclude that the remaining structural restrictions of the WUHCA nonetheless survived Commerce Clause scrutiny. The court's decision to uphold those provisions was particularly remarkable because the State had all but conceded that the provisions were unconstitutional in the absence of an in-state holding company incorporation requirement, and sought to defend in-state incorporation on the ground that it was a necessary predicate for upholding the remaining provisions. *See* Pet. App. at 25a. The Seventh Circuit, however, found no infirmity in the remaining structural provisions. According to the Court of Appeals, because these provisions impose burdens equally on interstate and intrastate commerce, they should be subject to the *Pike* balancing test, even though the provisions "do all have effects on interstate commerce" and will regulate transactions that "occur entirely outside of Wisconsin." *Id.* at 30a. The court believed these provisions should be upheld under *Pike* notwithstanding their extraterritorial effects because it deemed the statute "facially

neutral" as between inter- and intrastate commerce, *id.* at 31a, and because the provisions protect Wisconsin ratepayers by reducing the ability and incentive of holding companies to engage in improper cost-shifting from regulated to unregulated businesses within their holdings, *id.* at 33a. In so doing, the Seventh Circuit refused to follow what it described as merely the plurality position of *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) – i.e., that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." *Id.* at 642-43; *see* Pet. App. at 31a (rejecting the plurality opinion in *Edgar* while acknowledging that if that opinion governed, Alliant's view must prevail).

Denying Alliant's petition for rehearing *en banc*, the Seventh Circuit panel acknowledged that it had applied too narrow a test for per se invalidity under the Commerce Clause, and recognized that a state law can be per se invalid even if it does not discriminate against interstate commerce. Pet. App. at 2a-3a. But the court nevertheless reaffirmed its prior ruling, on the theory that nondiscriminatory laws are per se invalid only where they "facial[ly] regulat[e]" interstate commerce. *Id.* at 3a. Because the WUCHA does not do so, the court held, it remains subject to the more lenient *Pike* balancing test. *Id.* at 4a.

If left undisturbed, the Seventh Circuit's ruling will have the perverse consequence of authorizing Wisconsin state regulation of the extraterritorial conduct not merely of Wisconsin corporations but of *all* holding companies (wherever they are incorporated) that own as little as 5% percent of a Wisconsin public utility. Wis. Stat. § 196.795(1)(h)1.a. Common ownership of more than 10% of such holding companies is forbidden without prior PSC

approval. Wis. Stat. § 196.795(3). Such holding companies will face a fixed 25% cap on the non-utility assets they can own anywhere in the world. Wis. Stat. § 196.795(6m)(b). These holding companies may in many circumstances be forbidden from selling securities without prior approval of the Wisconsin PSC. Wis. Stat. §§ 201.03, 201.05. Likewise, they cannot pay dividends to shareholders if the Wisconsin PSC concludes that dividend payments would impair the holding company's capital. Wis. Stat. § 201.11.

Review of the Seventh Circuit's decision is urgently needed. The decision conflicts directly with *Healy* and *Brown-Forman* in upholding state regulation of interstate commerce occurring wholly outside state borders of out-of-state corporations. The Seventh Circuit's confused and internally contradictory rationale points up the need for guidance from this Court as to when the per se rule applies, as does the fact that the Seventh Circuit's approach in this case conflicts with that of the Third Circuit, *see A.S. Goldmen & Co. v. New Jersey Bureau of Securities*, 163 F.3d 780, 786 (3d Cir. 1999), and appears to conflict with the First Circuit's approach, approved by this Court, *see Pharmaceutical Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001), *aff'd sub nom. Pharmaceutical Research and Mfrs. of Am. v. Walsh*, 123 S. Ct. 1855 (2003). Moreover, if left undisturbed, the Seventh Circuit's decision – and the principle of Commerce Clause jurisprudence it espouses – will have severe adverse consequences for the utility industry in particular and for the free flow of investment capital generally.

REASONS FOR GRANTING THE WRIT

This Court has held that "a state statute that directly regulates *or* discriminates against interstate commerce" is

"virtually per se invalid," whereas a statute that "has only indirect effects on interstate commerce and regulates evenhandedly" must be "examined," pursuant to the balancing test enunciated in *Pike*, 397 U.S. 137, to determine if "the State's interest is legitimate and . . . the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (emphasis added). State statutes whose "'practical effect' . . . is to control conduct beyond the boundaries of the State," i.e., extraterritorial commerce, constitute "direct regulation" proscribed per se by the Commerce Clause, "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336; *see Brown-Forman*, 476 U.S. at 582 (striking down a state statute that in operation "directly regulate[d]" out-of-state transactions by "[f]orcing a merchant to seek regulatory approval in [the regulating] State before undertaking a transaction in another [State]").

The per se proscription of state laws with the "practical effect" of regulating wholly out-of-state transactions specifically "reflects the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-36 (footnote omitted). This doctrine further reflects the notion that, pursuant to the Commerce Clause and under our federalist structure, one State may not "project[] [its] regulatory regime into the jurisdiction of another State," because the Commerce Clause also "protects against inconsistent legislation" as among the states. *Id.* at 337. A State's regulatory interests simply have no legitimate role to play where commerce occurring entirely outside the State is

concerned. Like the rule of virtual per se invalidity of state statutes which discriminate against interstate commerce, then, the per se rule against state regulation of commerce occurring entirely outside of that State is grounded in fundamental premises of the Commerce Clause. This principle can be analogized to "the limits on the [exercise of personal] jurisdiction of state courts [over persons]." *Healy*, 491 U.S. at 336 n.13. As in that case, "'any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" *Id.* (quoting *Edgar v. MITE, Corp.*, 457 U.S. 624, 643 (1982) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (624 (1977))).

1. This Court should review the Seventh Circuit's decision in this case because it conflicts directly with this Court's rulings in *Healy* and *Brown-Forman*, and the fundamental Commerce Clause principles they embody. Even after its clarification on rehearing, the Seventh Circuit continues to apply an erroneous rule that state laws are subject to the *Pike* balancing test so long as they do not regulate interstate commerce on their face (and are nondiscriminatory). For the Seventh Circuit, it was not enough that in operation the Wisconsin law will regulate transactions between non-Wisconsin actors occurring entirely outside of Wisconsin. Pet. App. at 30a-31a. As the appeals court would have it, this means only that the statute has extraterritorial "effects," a situation the court distinguished from "direct or facial" extraterritorial "regulation." *Id.* at 3a. Moreover, the court held, the mere fact that a statute has "*any* extraterritorial effects," even where the effect shown is the regulation of commercial activity occurring entirely outside of the State, is insufficient to trigger the per se rule. *Id.* at 3a (emphasis added).

The Seventh Circuit's requirement of a "facial" regulation of interstate commerce results in a per se rule significantly narrower than the one this Court has articulated. *See Healy*, 491 U.S. 324; *Brown-Forman*, 476 U.S. 573; *Edgar*, 457 U.S. 624. The "critical consideration" in this Court's cases is not "facial" regulation of interstate commerce, but "whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the state." *Healy*, 491 U.S. at 336 (emphasis added). If a court is to look at the "practical effect" of a statute to determine whether the statute regulates commerce outside its borders (and therefore directly regulates extraterritorial commerce), then that determination does not turn on whether the statute on its face regulates such activity.

Moreover, this Court's specific analyses in this arena have not turned on what the statutes at issue said on their face. *See Healy*, 491 U.S. at 338-39 (determining that state's affirmation statute constituted extraterritorial regulation barred per se by the Commerce Clause because the statute's effect in practice was to prevent brewers from undertaking competitive pricing in border states, and not considering in this analysis the fact that the statute as a matter of text only to out-of-state shippers); *Brown-Forman*, 476 U.S. at 583 (holding that the fact that the state statute on its face addressed only in-state transactions was "irrelevant if the 'practical effect' . . . [was] to control . . . prices in other States"). Nor, once this Court has found that the practical effect is to regulate conduct occurring wholly outside the State, has it considered it necessary to assess in some way the *degree* of that effect, that is, to distinguish between "any effects" and effects sufficiently weighty to trigger the per se rule.

This Court's adoption of an approach that looks at the real world operation, that is, a statute's "practical effect," is necessary to implement the principles the Commerce Clause protects. Because States simply have no legitimate interest in or inherent power regarding the control of commercial behavior outside their borders – and certainly not, as here, commercial behavior occurring extraterritorially between non-state actors – it cannot be determinative that a statute expresses facially the legislature's intent to regulate extraterritorial commerce. To the contrary, state regulation is flatly proscribed "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336.

2. The Seventh Circuit's decision also points up the continuing need for clarification regarding the scope of the per se rule of Commerce Clause invalidity. The appeals court concluded that the rule of decision here is provided by *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), which upheld a state regulation of in-state corporations that could have the effect of regulating transactions between non-state shareholders of such corporations. Pet. App. at 7a-8a. *CTS*, however, was expressly premised on the fact that the statute applied only to in-state corporations, 481 U.S. at 93 (distinguishing the statute at issue in *Edgar*), deeming it a proper regulation of entities existing only by virtue of state law. Here, by contrast, the Wisconsin statute applies to non-Wisconsin entities involved in commercial transactions outside Wisconsin. The Seventh Circuit also rejected Alliant's invocation below of the *Edgar* plurality, which stated that "[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects

within the State," 457 U.S. at 642-43; *see* Pet. App. at 31a. Yet subsequent opinions of this Court have not only cited that plurality opinion with approval but have reiterated and applied the legal principle expressed therein. *See Healy*, 491 U.S. at 333-34; *Brown-Forman*, 476 U.S. at 582-83. Thus, while the Seventh Circuit's decision cannot be justified based on the case law upon which it relies, plenary review is warranted to clarify any confusion on this important matter.

Review is also warranted because the Seventh Circuit's rejection of the *Edgar* definition of per se invalid extraterritorial regulation – that is, regulation of "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *Edgar*, 457 U.S. at 642-43 – conflicts with the express endorsement of that definition by the Third Circuit and is at a minimum in tension the First Circuit's equivalent formulation drawn from *Healy* and approved by this Court.

The Third Circuit, citing the exact portion of *Edgar* rejected in this case by the Seventh Circuit, has explained its view than that "the constitutionality of state regulations of interstate commerce depends largely on the territorial scope of the transaction that the state law seeks to regulate." *A.S. Goldmen*, 163 F.3d at 786. Applying this rule, the Third Court concluded that a state regulation preventing an underwriter from selling securities to buyers in other States was properly analyzed under *Pike*, rather than being per se invalid, because "the key" was "the territorial scope of the contract," and the transaction "d[id] not occur 'wholly outside'" of the regulating State where the contract offer occurred in that State. *Id.* at 787. The Third Circuit's focus on "territorial scope" to determine whether a state law impermissibly regulates commerce occurring outside of its

borders is indistinguishable from the rule urged before the Seventh Circuit by Petitioner Alliant.

Furthermore, the First Circuit, while not relying directly on *Edgar*, has expressed its rule regarding per se invalidity based on the equivalent formulation in *Healy*: that a state law with the "'practical effect' of regulating commerce occurring wholly outside that State's borders" is per se invalid, and "a state statute regulat[ing] commerce wholly outside the state's borders . . . will be invalid under the dormant Commerce Clause." *Pharmaceutical Research and Mfrs. of Am.*, 249 F.3d at 79-80 (1st Cir. 2001) (citing *Healy*, 491 U.S. at 336). While the First Circuit concluded that the regulation at issue did not involve state control of commerce occurring outside its borders, the rule the court enunciated in undertaking that analysis runs directly contrary to the to the rule applied by the Seventh Circuit in this case. *See id.* (concluding that requiring approval by the State's Medicaid administrator before a drug manufactured by a company not participating in a state price control program could be dispensed to in-state Medicaid recipients concerned intrastate commerce). This Court, affirming the First Circuit's decision on this and other grounds, approved of the First Circuit's formulation of the rule regarding extraterritorial regulation, explaining that the appellate court had "correctly stated" the question as being whether a state law regulates "an out-of-state transaction . . . either by its express terms *or by its inevitable effect*," and had correctly concluded that "[t]he rule that was applied in . . . *Healy* accordingly is not applicable [to this case]." *Pharmaceutical Research and Mfrs. of Am.*, 123 S.Ct. at 1871 (emphasis added). To have different Courts of Appeal articulating such dramatically different rules regarding the standard for determining when state regulation necessarily violates the Commerce Clause and contravenes

intolerably the need for a uniform federal law and for consistent nationwide application of Commerce Clause principles in particular.

3. Review is also warranted because of the serious practical harms the Seventh Circuit's decision will generate. The WUCHA provisions – particularly in the expansive form upheld by the Seventh Circuit (i.e., without the limitation that the rules apply only to companies incorporated in Wisconsin) – threatens to impede the flow of domestic and international investment capital to the utility industry. To leave the Seventh Circuit's rule undisturbed would mean that other statutes like the Wisconsin law may be enacted and survive court scrutiny in the future, only adding to this problem.

On the one hand, the WUCHA significantly constrains the free flow of investment capital in the public utility sector – as the Seventh Circuit acknowledged. *See* Pet. App. at 32a (recognizing that the statutes have "no small impact" on the extraterritorial transactions they regulate and, indeed, by requiring the approval of the state's regulatory authority for some transactions, and entirely prohibiting others, "place[] a high, sometimes prohibitive, transactions cost on these dealings"); *see also id.* at 26-27 (describing how utility holding companies like the petitioner will have trouble attracting interstate investors because such investors will not deem it worthwhile, for example, to divest of non-utility holdings in order to comply with the limit on the proportion of such holdings permitted, or to invest in more than 10% of the shares of a holding company without knowing whether that transaction will receive state regulatory approval).

On the other hand, obstruction of investment undermines the utility's sector's ability to grow, modernize, and keep

pace with consumer demand at a time when this industry has been exposed to be in crisis and, specifically, to be in need of massive infusions of capital. This crisis is exemplified by the nation's recent electricity failures on the East Coast and in the Midwest – the largest blackout in the nation's history. *See* Edward Walsh, *Blackout Sheds Light on Issue*, Wash. Post, Aug. 17, 2003, at A11. These power failures exposed the dire lack of investment in the infrastructure undergirding the nation's electricity supply: the aging 157,000 mile-long electric transmission network known colloquially as the "power grid." *See* Michael Barbaro, *Consumers Must Demand A (Pricey) New Power Grid*, Wash. Post, August 24, 2003, at F1 (explaining that the technology underlying the nation's existing system for providing electricity dates from the 1950s). It has been estimated that investment in the tens of billions of dollars is required merely to bring this technology up to the level needed to support current electricity use, *see id.*, and that is putting aside the problem that increases in demand for electricity are expected to significantly outpace increases in infrastructure investment over the next decade, *see* Mike Naeve, *How to Prevent Future Blackouts*, Wash. Post, August 17, 2003, at B7.

The present state of the utility industry is a clear reminder of the principle that our constitutional system was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Wisconsin, in this case, or another State in another case, may believe that to protect the interests of its residents it is appropriate to regulate extraterritorial transactions between out-of-state entities. One State's protection of its residents' interests, however, does not take into account the interests of

other States or of the nation as a whole. While it is only natural that any given State will behave in this matter – indeed, under our federalist system state governments are charged with representing the interests of state residents – it is the triumph of this type of parochialism in arenas where no one State's interests should govern that the Commerce Clause, as this Court has repeatedly explained and held, proscribes. *See id.* (explaining that the Commerce Clause power is necessary to prevent the States from applying "parochial" laws that can result in "a speedy end of our national solidarity"). In this case, Wisconsin's actions will impede the flow of badly needed interstate investment capital flows in the utility industry by preventing or severely circumscribing investment from non-Wisconsin investors in non-Wisconsin public utility holding companies. Regulation of such transactions must, under the Commerce Clause and consist with our federalist political structure, occur at the national rather than the state level. Only at that level can the broader array of interests truly at stake be represented and taken into account. *Cf. Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 n.2 (1945) ("The Court has often recognized that to the extent . . . the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.").

The potential for destructive and unconstitutional overreaching of state regulatory action such as that taken by Wisconsin in this case is further highlighted when one considers the growing importance of international investment in the domestic utility industry. *See* Pet. App. at 26 (referencing record evidence of increased investment in the utility market by investors with diversified holdings and

companies from outside the United States); *see also, e.g.*, Hoover's Company Profiles, October 9, 2003, *available at* 2003 WL 61723089 (describing acquisition by British corporation Thames Water of U.S. utility American Water Works). Whatever one deems the proper regulatory result as to whether and how to permit such foreign investment, state regulation of out-of-state investment activity by international entities cannot be sustained under our Constitution. Rather, such regulation properly occurs at the federal level, where national policy can speak with one voice. *See generally American Ins. Ass'n. v. Garamendi*, 123 S. Ct. 2374, 2386 (2003) (*citing Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979), for the proposition that the "negative Foreign Commerce Clause protects the National Government's ability to speak with one voice in regulating commerce with foreign countries" (internal quotation marks omitted)).

Indeed, the federal government has considered taking action in this regard, including by repealing the Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803, which *inter alia* requires approval by the Securities and Exchange Commission for the acquisition of securities, assets, or any other interest in domestic public utility companies, *id.* §§ 10, 11; *see* An Act to Enhance Energy Conservation & Research & Development, § 223, H.R. 6, 108th Cong. (1st Sess. Sept. 2, 2003) (public print of Senate Resolution passing House Resolution that among other things repeals the 1935 Public Utility Holding Company Act). While some foreign acquisitions have garnered SEC approval, *see, e.g.*, Order Authorizing Acquisition of Registered Holding Company by Foreign Holding Company (March 15, 2000), International Series Release No. 1217; 70-9473 and 70-9519, *available at* 2000

WL 279236, the Public Utility Holding Company Act has been seen as an impediment to such investment flows, *see* Peter Behr, *Legislation Would Set Rules for Grid*, Washington Post, Nov. 15, 2003, at A1.

At bottom, the Seventh Circuit, by failing to invalidate a state statute that controls, and therefore regulates, the conduct of out-of-state commerce transactions between out-of-state actors, has sanctioned an extraordinary over-reaching of state regulatory power that does not conform with this Court's interpretation of the Commerce Clause and the principles of national unity it protects and that conflicts with decisions of other circuit courts. Review is warranted because of the importance of the constitutional question, the grave problem faced by disagreement among the circuits on this matter, and the practical import for an industry that is critical to our nation's well-being.

CONCLUSION

For all the foregoing reasons, as well as those set out in the Petition for Certiorari, this Court should grant certiorari.

Respectfully submitted,

DONALD B. VERRILLI, JR.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

DANIEL J. POPEO
DAVID A. PRICE
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036

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**Counsel of Record*